

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPECTRUM DYNAMICS MEDICAL
LIMITED, : Docket #18-cv-11386
Plaintiff, :
-against- :
GENERAL ELECTRIC COMPANY, et al, : New York, New York
December 12, 2023
Defendants.

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PROCEEDINGS BEFORE
THE HONORABLE KATHARINE H. PARKER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-</u> <u>Direct</u>	<u>Re-</u> <u>Cross</u>
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E X H I B I T S

<u>Exhibit</u> <u>Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir</u> <u>Dire</u>
None				

1 THE DEPUTY CLERK: 18-cv-1386, Spectrum
2 Dynamics vs. General Electric Company. The
3 Honorable Katharine H. Parker presiding.

4 Beginning with counsel for the plaintiff,
5 please make your appearance for the record.

6 MS. BANDYOPADHYAY: Good morning,
7 Your Honor. This is Esha Bandyopadhyay of Fish &
8 Richardson on behalf of the plaintiff, Spectrum
9 Dynamics Medical Limited. With me, I have
10 Alex Pechette, also of Fish & Richardson.

11 THE COURT: Good morning.

12 THE DEPUTY CLERK: And counsel for the
13 defendant, please make your appearance for the
14 record.

15 MR. JENIKE-GODSHALK: Yes. This is
16 Jesse Jenike-Godshalk on behalf of defendants. I'm
17 from Thompson Hine. And I'm joined by
18 Brian Lanciault, also of Thompson Hine.

19 THE COURT: Okay. Good morning.

20 MR. JENIKE-GODSHALK: Good morning.

21 THE COURT: Before we get started, because
22 we are on the phone, I ask that you keep your phones
23 on mute unless you are speaking, and that you state
24 your name before speaking for clarity of the record.
25 As I've done with past calls, I'm making a recording

1 of the conference so that you can order a transcript
2 if you would like.

3 And I also remind you that the Court's
4 conference line is open to the press and public on a
5 listen-only basis, and that court rules prohibit
6 others from recording and rebroadcasting court
7 proceedings.

8 I scheduled this conference at plaintiff's
9 request because, as I understand it, Spectrum would
10 like to file a motion, a discovery motion, related
11 to an expert report. And my question for Spectrum
12 is, why is a discovery motion appropriate as opposed
13 to just a Daubert motion? To me, this seems like
14 the whole thing can be addressed in a Daubert
15 motion.

16 MR. PECHETTE: Your Honor, this is
17 Alex Pechette from Fish & Richardson. I can address
18 that question.

19 Daubert is about the Court's gatekeeping
20 role to keep out testimony that's not based on
21 reliable methodologies. The issue that we've
22 presented here is not about whether Mr. Levy relied
23 on reliable methodologies, it's that GE failed to
24 timely disclose his expert opinion.

25 So it's more styled as a motion to strike

1 for untimeliness than it is a motion to exclude
2 under Daubert because he applied unreliable
3 methodologies.

4 THE COURT: Well, you deposed Mr. Levy, did
5 you not?

6 MR. PECHETTE: We did, Your Honor. We
7 deposed Mr. Levy as a fact witness last year. I
8 believe in December -- November or December.

9 THE COURT: Okay.

10 MR. PECHETTE: But we had no notice,
11 Your Honor, at the time, that Mr. Levy had this
12 expert opinion on how GE and its customers would
13 have behaved differently if the StarGuide had not
14 been available. That's not a fact issue. It's an
15 expert opinion issue.

16 And GE never disclosed that Mr. Levy was an
17 expert in this case. They certainly never disclosed
18 this expert opinion. It was sprung on us in the
19 rebuttal report of their damages expert
20 Dr. John Putnam.

21 THE COURT: Yeah. Putnam is the expert who
22 was disclosed.

23 MR. PECHETTE: Correct.

24 THE COURT: And you learned about this
25 statement of Mr. Levy in that expert report, right?

1 MR. PECHETTE: That's correct, Your Honor,
2 but we had --

3 THE COURT: And so it was disclosed in that
4 expert report. You're not saying that the other
5 expert report is untimely? The damages expert.

6 MR. PECHETTE: So the damages expert report
7 of Dr. Putnam, that was not untimely. But he's
8 relying on an expert opinion from another witness,
9 Mr. Levy, who was never disclosed as an expert
10 witness, and they never served an expert report from
11 him.

12 THE COURT: Okay. I'd like to hear what
13 GE's position is on this.

14 MR. JENIKE-GODSHALK: Yes, Your Honor. So
15 our position -- I guess I'll begin by saying that if
16 this is a discovery motion, as Spectrum claims that
17 it is, it's an untimely discovery motion because, as
18 Spectrum itself acknowledges, it learned of
19 Mr. Levy's opinion back in July, four and a half
20 months ago, and it waited until the end of October,
21 after the close of all discovery, to raise this
22 issue.

23 Now, we put that in our letter to the
24 Court. And Spectrum has responded, saying they
25 couldn't possibly have raised this issue until after

1 they took Dr. Putnam's deposition in October because
2 only then did they know that Mr. Levy was definitely
3 offering an expert opinion. And they say shortly
4 after that deposition, they sent us a letter on
5 October 23rd raising this issue with us. So they
6 say this is all timely.

7 Frankly, that response is revisionist
8 history because, if you look at the October 23rd
9 letter that they sent us raising this issue, it just
10 makes a single passing reference to Dr. Putnam's
11 deposition. There is no suggestion in that letter
12 that this issue only came to Spectrum's attention as
13 a result of Dr. Putnam's deposition or that Spectrum
14 learned something new about Mr. Levy's opinion from
15 Dr. Putnam's deposition. Spectrum did not even
16 argue in its letter to us on October 23rd that
17 Mr. Levy's statement was definitely an expert
18 opinion.

19 So in sum, Spectrum could have written the
20 same letter to us with the same substance months
21 earlier while expert discovery was still open. It
22 simply chose not to. And the Court should not allow
23 Spectrum to raise this issue now, for the first
24 time, after the close of all discovery. There's
25 simply no reason for them to wait.

1 But even if we look at the merits of this,
2 Mr. Levy's opinion is not an improperly disclosed
3 expert opinion. Instead, it is a lay opinion, which
4 is not subject to the expert disclosure
5 requirements. So Federal Rule of Evidence 701
6 applies to lay opinions, and it lays out the
7 requirements there. The only requirements that are
8 relevant based on the arguments that Spectrum has
9 made in this case is that, first, the lay opinion
10 cannot be based on scientific, technical, or other
11 specialized knowledge that's within the scope of
12 Rule 702. That's one of the expert rules. And
13 second, that the opinion must be rationally based on
14 the witness's perception.

15 So, as to the first requirement, the Second
16 Circuit has recognized that a fact witness can offer
17 a lay opinion based on the witness's experience and
18 knowledge in working for a business. And I'll say
19 this is not just an outlier, like a single case.
20 There are many cases on this. And it's also
21 supported by the commentary that follows Rule 701
22 from the committee.

23 So this is exactly what Mr. Levy's opinion
24 is. It is an opinion based upon his experience and
25 knowledge in serving as a manager at GE Healthcare.

1 And even Spectrum itself, in laying the issue out,
2 says that.

3 And then with regard to the other
4 requirement that I mentioned, the second requirement
5 that it be rationally based on the witness's
6 perception, Spectrum argues that because Mr. Levy is
7 addressing a hypothetical, this couldn't possibly be
8 based on his perception. Well, again, in our
9 letter, we cite binding Second Circuit case law
10 rejecting that very argument and finding that an
11 opinion similar to the one here is -- I'm getting
12 some reverb all of a sudden. I don't know if you're
13 also hearing that.

14 Okay. It stopped.

15 THE COURT: I'm not hearing anything.

16 MR. JENIKE-GODSHALK: Okay. Okay. It
17 stopped. It was just a momentary thing.

18 Again, we've cited binding Second Circuit
19 case law that we're finding that an opinion similar
20 to the one at issue here, where you had a lay
21 witness addressing a hypothetical, that that was a
22 permissible lay opinion. So this is a lay opinion.
23 It didn't need to be disclosed in a report.

24 And I will also mention that with regard to
25 the timing, Spectrum is saying, well, this was

1 sprung on us late in the game. Why did they need to
2 wait until the responsive or rebuttal expert report
3 of their damages expert?

4 Well, the reason that it didn't come up
5 earlier was because we didn't realize that we needed
6 to get an opinion from Mr. Levy until we saw the
7 opening damages report from their damages expert,
8 Mr. Phillips. So this opinion was not even elicited
9 from Mr. Levy by our damages expert, Dr. Putnam,
10 until after we received the opening expert report
11 from their damages expert. So that's why you have
12 the timing here, that they first saw this in the
13 summer of this year.

14 THE COURT: Okay.

15 MR. PECHETTE: Your Honor, this is
16 Alex Pechette, if I may.

17 So first point I'd like to make is that we
18 absolutely did learn something new at Dr. Putnam's
19 deposition, and that is why we brought this motion
20 when we did. As we stated in our letter to the
21 Court, we cite several quotes from Dr. Putnam's
22 deposition where he made it crystal clear that
23 Mr. Levy is offering an expert opinion, not a lay
24 opinion. Without that testimony, we didn't know
25 whether this was going to be an expert or a lay

1 opinion. We didn't know how to bring this motion,
2 Your Honor.

3 On the next point that Mr. Jenike raised,
4 that this is a lay opinion, I want to remind the
5 Court that it is GE's burden to prove that this
6 testimony is admissible under Rule 701 as a lay
7 opinion. They cannot satisfy their burden of
8 proving two essential elements of admissibility
9 under Rule 701.

10 First, they can't prove that Mr. Levy's
11 opinion is not based on specialized knowledge.
12 Second, they can't prove that Mr. Levy's opinion is
13 based on firsthand knowledge or observation.

14 THE COURT: Okay. But what you're doing is
15 you're arguing now not a discovery argument, but now
16 you're arguing an in limine, making in limine
17 argument. And the in limine argument would be
18 before Judge Broderick on summary judgment or for
19 trial. So I'm not sure that the discovery rules
20 are -- I'm not sure that there's a discovery motion
21 here.

22 What GE is doing is offering this as a lay
23 opinion. You disagree that it's a lay opinion, and
24 will move in limine to exclude that under the rules
25 of evidence. That's not really a discovery issue.

1 You've brought this up quite late in the game. If
2 you -- you knew about this in July and you could
3 have raised it then.

4 If your complaint is that you don't think
5 that Levy has a factual basis to assert this opinion
6 and that he just pulled it out of thin air, well you
7 can cross-examine him on that and say that. I would
8 be inclined to allow a limited deposition, maybe no
9 more than one hour, of the basis for that opinion,
10 if you feel that it's new information that you
11 really don't understand at all. But at most, that's
12 what I think would be appropriate here, and then you
13 can make your arguments that it's not a proper lay
14 opinion and should be excluded on that basis or --
15 and that GE's expert report should be stricken under
16 Daubert because it relies on something that is not
17 supportable.

18 This really isn't a discovery motion, in my
19 view.

20 MR. PECHETTE: Your Honor, this is
21 Alex Pechette again.

22 I don't think that's quite right because
23 the rule that we're bringing this motion under is
24 Rule 37, which is a rule that prohibits sandbagging
25 in discovery. It's a rule that prohibits untimely

1 disclosures of discovery. And I don't think that's
2 really a proper motion in limine issue. It's a
3 discovery issue. And we --

4 THE COURT: Well, this is not an untimely
5 disclosure. This is not a disclosure that was
6 required to be made under the expert disclosure
7 rules. That's not what this is being offered for,
8 and so --

9 MR. PECHETTE: Your Honor --

10 THE COURT: -- any Rule 37 motion is
11 futile.

12 MR. PECHETTE: Your Honor, if I may. This
13 absolutely is an expert opinion. The Second Circuit
14 has held that a lay opinion must be the product of
15 reasoning processes familiar to the average person
16 in everyday life. It cannot be based on
17 considerable training -- specialized training and
18 experience outside the can of the average person.

19 There is no question that Mr. Levy's
20 opinion is based on specialized reasoning processes
21 and experience unfamiliar to the average person.
22 Dr. Putnam admitted at his deposition, which is the
23 first time we learned about this issue, that
24 Mr. Levy based his opinion on, quote, an entire
25 range of experience and years of marketing these

1 machines against one another. He relied on his
2 experience and specialized knowledge as a GE
3 executive to opine on how GE and its customers would
4 have behaved differently in this but-for world.
5 These are not reasoning processes familiar to the
6 average person in everyday life. It's expert
7 opinion, Your Honor.

8 So it falls under the expert rules. They
9 had to disclose him as an expert. They didn't.
10 They had to give a report, an expert report. They
11 didn't. It's untimely disclosure. That's why it
12 falls under Rule 37, Your Honor, discovery motion.

13 THE COURT: Okay. Well, a Rule 37 motion
14 is denied because this is being offered as a lay
15 opinion. And furthermore, your motion is late. You
16 knew about this back in July.

17 This does not preclude you from making a
18 Daubert motion, and it does not preclude you from
19 making any evidentiary motion before
20 Judge Broderick.

21 If you would like to depose Mr. Levy for an
22 additional hour on the basis for this opinion, I
23 will permit that. Do you want to do that?

24 MR. PECHETTE: Your Honor, we'll need to
25 confer with our client and get back to you on that.

1 THE COURT: Okay. So if you want to do
2 that, since -- I'm only going to allow you an hour
3 because it's extremely discreet. But if you want to
4 do that, that deposition needs to be taken by
5 January 15.

6 Is there anything else that Spectrum would
7 like to raise?

8 MS. BANDYOPADHYAY: Nothing else,
9 Your Honor.

10 THE COURT: Anything else that GE would
11 like to raise?

12 MR. JENIKE-GODSHALK: No, Your Honor.

13 (Discussion held off the record.)

14 THE COURT: And that is off the record.

15 So have a happy holiday, everybody. We are
16 adjourned.

17 MR. JENIKE-GODSHALK: Thank you,
18 Your Honor. You have a happy holiday as well.

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C E R T I F I C A T E

I, Marissa Mignano, certify that the foregoing transcript of proceedings in the case of Spectrum Dynamics Medical Limited v. General Electric Company et al, Docket #1:18-cv-11386, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Mignano
Marissa Mignano

Date: December 14, 2023